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No. 188

Supreme Court of the United States

October Term, 1943.

FRANCIS E. BAUMER,
Petitioner,

vs.

FRANKLIN COUNTY DISTILLING COMPANY, INCORPORATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FRANK S. GINOCCHIO,
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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner herein respectfully presents to this Court its petition for Writ of Certiorari, as follows:

JURISDICTION.

1. Jurisdiction in this cause is based upon 28 USCA Sec. 347.

2. The date of the original judgment to be reviewed is April 15, 1943 (R. 241). Petition for rehearing was duly filed and was denied.

SUMMARY STATEMENT OF QUESTION INVOLVED.

This cause presents an instance in which the Circuit Court of Appeals has wholly disregarded and misapplied the prevailing state law.

On March 14, 1940, a written contract was consummated between the petitioner and the K. Taylor Distilling Company, since changed to the Franklin County Distilling Company, whereby petitioner was assigned for a period of three years the exclusive right to sell respondent's leading brand of whiskey known as "K. Taylor" Bottled in Bond throughout the State of Ohio. At the time this contract was entered into respondent had a vast quantity of whiskey on hand and was utilizing every possible outlet to place its commodity on the market. Petitioner was encouraged to build a lasting business by the then President of respondent in these words: " * * * you need have no hesitancy about building a lasting business with "K. Taylor" whiskey. The brand name will remain the same * * *."

After this contract had been carried out by the parties for slightly more than five months, respondent sold out to the large whiskey interests and in the sale transferred to National Distillers Products Corporation its name of The K. Taylor Distilling Company, some forty-seven thousand (47,000) barrels of whiskey and the whiskey brand or label known as "K. Taylor", thereby rendering itself incapable of further furnishing said label to respondent or permitting him to use a back label showing the whiskey as bottled by the K. Taylor Distilling Company. After a considerable lapse of time, during which the parties were attempting to work out some settlement, petitioner filed a suit for breach of the contract and sought to recover as damages the profits he would have received had the contract been completed.

Since the opinion of the Circuit Court of Appeals sustains petitioner on every proposition except the element of

damages, we shall confine our statement and argument to that sole question.

On the question of damages the testimony of experts of many years experience in the whiskey buisness, the testimony of the then sales manager for respondent, and the showing this whiskey made in other communities and localities comparable to the State of Ohio stands absolutely undisputed and unchallenged except by argument. The concensus of the testimony is that, given a reasonable time, the whiskey covered by the "K. Taylor" label would have been a leader and would have done equally well or better in Ohio than it had in other states. All of this testimony was taken prior to the time the smaller whiskey industries realized there would be a national shortage of whiskey. However, the larger interests apparently began to realize this as early as 1940, as it was then that they commenced the practice, widely indulged in since, of buying up all of the smaller businesses together with their whiskey on hand. Even on the conservative market existing at that time, however, some of the testimony shows that a monthly sale of up to two thousand (2,000) cases could reasonably be expected. Shortly after the contract became effective the price of whiskey rose to where petitioner realized approximately $1.00 per case as his 5% commission.

In the District Court both parties assumed that the Kentucky law should govern in deciding the issues and the question of the applicable state law was never raised. On appeal to the United States Circuit Court of Appeals for the 6th Circuit the Court there for the first time stated, correctly we believe, that the contract should be construed in accordance with the laws of the State of Ohio. In applying the law of the State of Ohio the Court cited three decisions, the latest of which was decided in 1903 and one as early as 1860 to the effect that future profits were neces-

sarily of such a speculative and conjectural nature they could not be recovered.

REASONS WHY PETITION SHOULD BE GRANTED.

(1.) The prevailing law of the State of Ohio has been misapplied and misquoted. (2.) The correct law as announced by the United States Supreme Court wherein the governing rule as to profits is so strongly set forth that a deviation therefrom is classified in the opinion as "legalized robbery" is absolutely ignored. (3.) Substantial justice has not been done between the parties. If either party should suffer by reason of any uncertainty as to the amount of the damage, then the wrongdoer or person causing the breach should suffer rather than the innocent party.

WHEREFORE, it is respectfully submitted that this petition should be granted and that this Court should review the decision of the United States Circuit Court of Appeals for the 6th Circuit and, upon final consideration reverse said cause.

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Counsel for Petitioner.

STROTHER KISER,
JOSEPH L. LACKNER,
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